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Supreme Court of the United States.

OCTOBER TERM, 1891.

ALFRED EARNSHAW, PLAINTIFF in error,
vs.
THE UNITED STATES.
} No. 11.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON RE-ARGUMENT.

WM. A. MAURY,
Assistant Attorney-General.

All that is said in the brief of the eminent counsel opposite might be admitted without prejudice to the position taken in behalf of the Government, which, it seems to us, may be safely rested on the answer given by this court in University *v.* Finch (18 *Wall.*, 109) to the argument, there urged, that a sale under a deed of trust to secure a debt during the late civil war was void because the debtors, the grantors in the deed, were at the time of the sale residents of Virginia, and could not have lawfully received notice of the intended sale in St. Louis. The court said:

> It is said that the power to sell in the deed of trust required a notice of the sale in a newspaper; that this notice was intended to apprise the complainants of the time and place of sale, and that, inasmuch as it was impossible for such notice to reach the complainants, no sale could be made. If this reasoning were sound, the grantors in such a deed need only go to a place where the newspaper could never reach them to delay the sale indefinitely or defeat it altogether.

It is submitted that no ground is presented for disturbing the judgment.

WM. A. MAURY,
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Undoubtedly the appraisers had full authority to make the reappraisement asked for by the plaintiff in error, Earnshaw.

It would seem equally clear that the form of notice given to the plaintiff in error was entirely legal. Indeed, no dispute seems to be made about its form.

It is true that personal service of notice or process on a party is indispensable to authorize a judgment *in personam* against such party. Such is the rule at common law, and its observance has been upheld with a firm hand by this court in Pennoyer *v.* Neff (95 U. S. R., 714) and a number of other cases to which it is unnecessary to refer.

But, laying aside original process and cases in which the effect of a disregard of notice is to bring the party in default into contempt, the common law allows notice to be given in many cases by mail or by leaving a copy of the notice at the dwelling-house or place of business of the party to be affected by it.

It would be intolerably burdensome and a perpetual invitation to fraudulent evasion if, for example, a personal service were required to put an end to a tenancy or fix the liability of an indorser.

In *Jones* v. *Marsh* (4 T. R., 464), which was ejectment, the question was whether the defendant had been served with due notice to quit. It appeared that the notice had been served on the defendant's maid servant at his house, which was not situated upon the demised premises, and the contents explained to her at the time; but there was no evidence that it ever came to the defendant's hands, except as above. As this notice was to determine an interest in lands, it was objected that it was not sufficient, and the learned judge nonsuited the plaintiff, giving him leave, however, to move to set aside the nonsuit, and enter a verdict for him, if the court in banc should be of opinion that the notice was sufficient.

A rule *nisi* having been obtained for that purpose, and cause having been shown, Lord Kenyon and Mr. Justice Buller, in making the rule absolute, used the following language:

> LORD KENYON, *Ch. J.*: This is different from the cases of personal process; but even in the case alluded to of service on the wife, I do not know that it is confined to a service on her on the premises; I believe that if it be served on her in the house, it is sufficient. But in every case of the service of a notice, leaving it at the dwelling house of the party has

always been deemed sufficient. So wherever the legislature has enacted that, before a party shall be affected by any act, notice shall be given to him, leaving that notice at his house is sufficient. So also in the case of an attorney's bill, or notice of a declaration being filed. And, indeed, in some instances of process, leaving it at the house is sufficient; as a *subpœna* out of the court of chancery, or a *quo minus* out of the exchequer. In general, the difference is between process to bring the party into contempt and a notice of this kind; the former of which only need be personally served on him.

BULLER, *J.*: *Ex concessis* personal service is not necessary in all cases. Then what were the facts of this case? It was proved that this notice was delivered to the tenant's servant at the dwelling house of the tenant, and its contents were explained at the time; and that servant, who was in the power of the defendant, was not called to prove that she did not communicate the notice to her master; this was ample evidence on which the jury would have presumed that the notice reached the tenant.

In *Johnston* v. *Robins* (3 Johns., 440), the supreme court of New York adopted the reasoning of the King's Bench in *Jones* v. *Marsh* (*supra*), and held that service of a copy of a declaration, with notice of a rule to plead, by leaving the same at the defendant's house in his absence, with a young man who said he was defendant's clerk, and that he lived in the house and expected the defendant home soon, and would deliver the papers to him so soon as he returned, was a good service and a sufficient answer to the defendant's motion to set aside the default that had been entered against him for want of a plea.

To these authorities may be added *Clark* v. *Keliher* (107 Mass., 406), *Walker* v. *Sharpe* (103 *Ib.*, 154), *Wells* v. *Child* (12 Allen, 330), and *Wade on the Law of Notice*, §§ 640 and 851.

And it is hardly necessary to say that this court has deferred to public convenience by permitting service on counsel of the process by which it obtains jurisdiction over a defendant in error or appellee, such process not being original, but merely notice of a further proceeding in a suit already existing.

If the positions above taken are sound, it would seem clear that the plaintiff in error can not prevail, unless he shows that the refusal of the appraisers to put off the reappraisement until he should return to the country was such an abuse of discretion as made every step taken afterwards unauthorized and null.

There can be no doubt that the appraisers had authority to decide whether the grounds on which the application for delay was made were sufficient.

It would seem equally clear that the decision of the appraisers upon the application made in behalf of the plaintiff in error for a postponement is entitled to the same presumption in its favor as the decision of any inferior tribunal upon a matter within its jurisdiction, and therefore that their denial of the postponement is conclusive and not open to collateral attack, unless it involves a plain abuse of power.

This principle is applicable to all officers who perform judicial functions, whether they are courts or only *quasi* courts (1 Black. on Judgments, § 250, p. 305). In this particular, courts and *quasi* courts of all descriptions stand on the same footing.

This statement of the law has the support of this court, which, in *ex parte* Reed (100 U. S., 13), applied the principle to a court-martial, saying:

> The court had jurisdiction over the person and the case. It is the organism provided by law and clothed with the duty of administering justice in this class of cases. Having had such jurisdiction, its proceedings can not be collaterally impeached for any mere error or irregularity, if there were such committed within the sphere of its authority. Its judgments, when approved as required, rest on the same basis, and are surrounded by the same considerations which give conclusiveness to the judgments of other legal tribunals, including as well the lowest as the highest, under

like circumstances. The exercise of discretion, within authorized limits, can not be assigned for error and made the subject of review by an appellate court (p. 23).

To the same effect are *Commrs. of Knox County* v. *Aspinwall* (21 How., 539), *Martin* v. *Mott* (12 Wh., 19), *Keyes* v. *United States* (109 U. S. R., 336), *Comstock* v. *Crawford* (3 Wall., 396), and other cases which it is unnecessary to cite in support of a principle so well established.

WAS THERE AN ABUSE OF DISCRETION?

It is to be remarked that the plaintiff in error himself asked for the reappraisal, and yet from the time of postponement by the appraisers he does not appear to have taken a single step to quicken the appraisers.

Indeed it seems a fatal instance of laches on his part that he left the county *without communicating with the appraisers at all.* It was his *duty* to arrive at some understanding with them before taking his departure, because they were officers of the Government, and bound to avoid unnecessary delay in the performance of a duty concerning the collection of the revenue.

This the plaintiff in error was bound to know, as he was also bound to know that the collection of the revenue could not be delayed for his personal convenience; in other words, that he could not leave the country and thereby render the reappraisal which he had asked for impossible until he saw fit to come back again.

It must be presumed that all the delay that occurred was *necessary.* If it was not, the fact should have been shown. This court will not assume official neglect for the

purpose of finding a reason for overturning official action. The whole burden of this attack on the action of the appraisers rests on the plaintiff in error.

He is not at liberty, we submit, to take advantage of the delay of the appraisers for any purpose, because it is well settled that the Government can not be prejudiced by laches or delay on the part of its officers (*Robertson* v. *Sichel*, 127 U. S. R., 516, and cases there cited on page 515). It does not lie with a surety even, who is said "to possess an interest in the letter of his contract," to set up such laches or delay in answer to the Government's demand against him.

The plaintiff in error, therefore, had no right to presume or assume anything from the delay of the appraisers.

As the reappraisal was ordered at the instance of the plaintiff in error, the appraisers had a right to assume that he would not leave the county without communicating with them on the subject or appointing a representative.

To say that the appraisers were bound to wait for the return of the plaintiff in error is to reverse the principle that the convenience of individuals must yield to that of the Government.

It was inexcusable laches in the plaintiff in error to depart the country without any communication with the appraisers or without authorizing some one to represent him in case the appraisers should proceed during his absence.

It would have been extraordinary, indeed, if the trial court had instructed the jury that the refusal of the appraisers to delay proceedings until after the defendant

below had returned home was, in view of the facts, an arbitrary abuse of discretion.

It seems indispensable to the success of the plaintiff in error that he should show that he left nothing undone in the premises which it was his duty to do. This much, at least, it would seem, should be required before allowing him the right to delay the reappraisal to suit his convenience.

The decision of Judge Brown in the case of *United States* vs. *Doherty* (27 Fed. Rep., 731) does not militate against the Government's contention here, we submit. That case was to enforce the penalty denounced against an importer for refusing to answer a question put to him by an appraiser.

The judge decided that the question propounded had no relevancy to the question of valuation, and that in asking it the appraiser had exceeded his authority, and consequently that no offense had been committed under the law.

In that case it was held that the special tribunal had no jurisdiction. In this case there was undoubted jurisdiction, and the simple question is whether Earnshaw was entitled to have the reappraisal further postponed until his return to the country upon the facts that Earnshaw himself asked for the reappraisement, and, knowing that notice of proceedings for the reappraisal might be given at any day, chose to leave the country without communicating with the appraisers or authorizing anyone to represent him at the appraisement in case it should be taken up during his absence.

Certainly appraisers have the power to decide whether

applications for postponements are sufficient or not, and an erroneous decision on any such application is not open to collateral attack.

The question here is, when stripped of all disguise, whether the decision of the appraisers on the evidence before them was *sound or not.*

The case is argued as though the appraisers acted without evidence, but, that is not so. They had but to appeal to the above facts, known to them *ex officio*, for the *data* upon which to dispose of the application for further postponement.

It is therefore respectfully submitted that the record presents no ground for disturbing the judgment.

WM. A. MAURY,
Assistant Attorney-General.